BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JUSTIN W. CAMPBELL Claimant VS. **SUPERIOR TESTERS ENTERPRISES** Respondent AND **TRAVELERS INDEMNITY CO.** Insurance Carrier	)	Docket No. 1,043,562

ORDER

Respondent requested review of the February 28, 2011 Award by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Board heard oral argument on June 17, 2011.

APPEARANCES

R. Todd King, of Wichita, Kansas, appeared for the claimant. William L. Townsley, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties agreed that if this claim is found compensable, claimant sustained a 10 percent functional impairment as a result of the accident, although respondent maintains that it is entitled to a 5 percent credit against that impairment for the pre-existing impairment assigned by Dr. Barnett.

ISSUES

The ALJ found claimant suffered personal injury arising out of and in the course of his employment with respondent and awarded claimant a functional impairment of 10 percent along with an 85.5 percent work disability.[1] The ALJ went on to find claimant's AWW to be $576.36, a figure based upon claimant's most recent work period with respondent. As a result, she found there was an underpayment of temporary total disability in the amount of $7,628.23.

Respondent contends the Award should be reversed and asserts a number of errors. Respondent concedes claimant has a history of back problems that ultimately required surgery, but maintains his need for treatment and surgery did not result from a work-related injury that arose out of and in the course of his employment with respondent. Respondent argues the most credible evidence in the record supports a finding that claimant's back pain was related to a pre-existing condition and that simply stepping off the basket at work was a personal risk that did not arise out of employment. Therefore, respondent argues that the Award should be reversed and claimant denied compensation.

In the alternative, if the Board finds that the claimant is entitled to compensation, respondent believes the award must be reversed and recalculated. Respondent argues that by using the correct average weekly wage, which includes the entire 26 weeks prior to claimant's alleged accident, and recognizing respondent's belief that claimant needs no restrictions, claimant has no task loss. Moreover, respondent contends the evidence in the record shows that claimant had sporadic employment following his injury and as a result, claimant does not have a 100 percent wage loss for the entire period as found by the ALJ. Rather, the wage loss would be something less than 100 percent for each week claimant was employed. And when properly calculated, the work disability award, to the extent one is due, would cease as of April 5, 2010 and should commence only after the functional impairment has paid out and not, as calculated by the ALJ.[2]

Claimant argues that the ALJ should be affirmed in all respects, although claimant acknowledges that there is evidence contained within this record to support a reduction in the wage loss for those weeks, post-injury, when claimant was employed by another company.

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[1] The 85.5 percent work disability is comprised of a 100 percent wage loss and a 71 percent task loss. The work disability ends on April 5, 2010 as claimant obtained comparable employment on that date and his average weekly wage (AWW) exceeded 90 percent of his pre-injury wages.

[2] The ALJ awarded a 10 percent functional impairment to be paid simultaneously with the work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award sets out findings of fact that are detailed, accurate, and supported by the record. The Board further finds that it is not necessary to repeat those findings in this order. Therefore, the Board adopts the ALJ's findings as its own as if specifically set forth herein. Accordingly, only those facts relevant to explain the Board's decision will be referenced.

As noted by the ALJ, on October 25, 2008 claimant was a member of an oil well casing crew working in the dark on a poorly lit oil rig. He was in the process of laying pipe down, when he stepped down from the pipe basket, which holds the pipe and is suspended approximately three feet off the ground, and felt a shooting pain in his back and down his left leg.

Respondent does not dispute that this event occurred. Respondent merely maintains that the act of stepping down from the pipe basket was an act of day-to-day living, thus constituting a personal or neutral risk for which it should not be responsible. Respondent cites *Martin*[3] and *Johnson*[4] in support of this argument.

Martin involved a school custodian who had a history of back problems, but alleged an injury while getting out of his vehicle on his employer's premises after arriving for his work shift. The *Martin* Court stated:

> Before an injury can be said to arise out of the employment, the risk must be incidental to the work. A risk is incidental to the employment when it belongs to or is connected with what the workman has to do in fulfilling his duties (Citations omitted)
>
> In applying these rules, it is clear from the facts presented by this case that the risk involved in claimant's accident was not associated with his employment and cannot be construed as a neutral risk, but must be considered a personal risk. We agree with the respondent's assertion that neither the claimant's vehicle nor the condition of the premises had anything to do with the injury. There were no intervening or contributing causes to the accident except for the claimant's own actions in exiting from the truck. Considering the history of the claimant's back problems, it is obvious that almost any everyday activity would have a tendency to aggravate his

[3] *Martin v. U.S.D. 233*, 5 Kan. App.2d 298, 615 P.2d 168 (1980).

[4] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, *rev. denied* 281 Kan.1378 (2006).

> condition, i.e., bending over to tie his shoes, getting up to adjust the television, or exiting from his own truck while on a vacation trip. This is a risk that is personal to the worker and not compensable.[5]

Similarly, in *Johnson*, a county worker with a history of left knee problems sustained an injury when she attempted to stand to reach for a book and twisted her knee. The Court of Appeals concluded that it was "just a matter of time" before she would sustain that sort of injury to her knee and that work activities did not contribute to that event. Thus, her injury was not compensable.

Here, the ALJ was not persuaded by the respondent's argument as he concluded -

> ... stepping down three feet from a basket is more than a personal or neutral risk. Claimant's testimony, plus the credible medical evidence, is persuasive that claimant sustained personal injury by accident arising out of and in the course of his employment.[6]

The Board has carefully reviewed the entire record and concludes the ALJ's finding on this issue should be affirmed. The Board has, in the past, concluded that the exclusion of normal activities of day-to-day living from the definition of injury was an intent by the Legislature to codify and strengthen the holdings in *Martin* and *Boeckmann.*[7] That reasoning was later embraced in *Johnson*. But claimant's injury in this case is distinguishable from those present in *Martin, Boeckmann* and *Johnson.* While stepping down might be considered an activity which admittedly can occur whether at the workplace or not, it is uncontroverted in this case that claimant was stepping down *three feet* from a basket onto the rig floor. The area was not well lit. There is no evidence within this record that even remotely suggests that claimant performs such an activity outside his workplace. Moreover, the Court in *Boeckmann* distinguished cases in which "the injury was shown to be sufficiently related to a particular strain or episode of physical exertion" to support a finding of compensability.[8] This case represents such an instance. Claimant's act of stepping down from this basket constitutes an act that is sufficiently and uniquely related to claimant's work responsibilities. Accordingly, the Board, like the ALJ, finds that claimant's accidental injury arose out of and in the course of his employment with respondent.

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[5] *Martin*, 5 Kan. App. 2d at 299-300.

[6] ALJ Award (Feb. 28, 2011) at 4.

[7] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[8] *Id.* at 737.

Respondent also argues that the ALJ's conclusion as to claimant's AWW was incorrect and should be modified. Simply put, respondent maintains claimant was its employee in excess of 26 weeks and that the total sum of his wages earned during that time should be taken into consideration when determining claimant's AWW. And when that is done, the resulting figure is $34.95 per week. This figure reflects the uncontroverted fact that claimant was paid by his output, 4 cents a foot. However, the dispute between the parties stems from the nature of the job involved and the fact that claimant was not regularly working for respondent in during the 26 weeks before his injury.

Although claimant had worked for respondent sporadically for a period of years, the parties agree claimant did not work for respondent from June to early October 2008. Claimant worked for HydroChem during this interim period, working as a "stabber".

As is the case in this industry, respondent maintains a list of workers from which the crew leader can select for any given job. The crews are not "set" and it appears that no one is guaranteed a minimum amount of work. Claimant was not required to accept any minimum number of jobs, nor was he precluded from working other jobs for other employers. But if he was asked to work and refused, that refusal made it less likely that he would be asked to work the next available job. There is some evidence in the record that shows that respondent considered claimant and the other workers employees even when they were not actively working on jobs. Their employment paperwork was maintained and once an employee returned after an extended absence, no new forms were completed.

Respondent called claimant for a job the week October 11-15 and he began working regularly up to October 25, 2008, the date he was injured. Respondent maintains claimant was, at all times, considered an employee, could have been called to work and in fact, jobs were available. Respondent maintains claimant's cumulative wages in the 26 weeks before his injury were $908.72 and when that figure is averaged over the 26 weeks, the resulting average weekly wage is $34.95.

Claimant contends he was not considered an employee from June to early October as he was working elsewhere and was not contacted for jobs during that period. And after returning to respondent's employee, he earned $576.36 during his first full week of employment. Based upon this evidence, claimant contends his AWW is $576.36. But at oral argument, claimant acknowledged that he worked the week ending October 25, 2008, earning another $118.56. Thus, the total sums earned during these two weeks was $694.92, which when averaged, yields an AWW of $347.46.

The ALJ concluded the claimant's AWW should be $576.36 which reflects the one week of pay earned for the week ending October 11, 2008. She first noted the applicable statute, K.S.A. 2008 Supp. 44-511(b)(5) is the controlling statute to use for computing claimant's average weekly wage. That statute provides as follows:

> If at the time of the accident the money rate is fixed by the output of the employee, on a commission or percentage basis, on a flat-rate basis for performance of a specific job, or on any other basis where the money rate is not fixed by the week, month, year or hour, and if the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection.

Then, the ALJ offered the following reasoning:

> The Administrative Law Judge is persuaded by the claimant's argument. Claimant's employment for respondent ceased in June of 2008. Claimant provided no services and received no wages from respondent for several consecutive weeks. Claimant was clearly separated from his work with respondent during this time frame. Claimant began a new period of employment when he returned to work for respondent in October of 2008. The weeks claimant worked in this new period of employment constitute "the number of calendar weeks so employed" as indicated in the controlling statute. Accordingly, claimant's average weekly wage is $576.36.[9]

The Board has considered respondent's argument and finds the ALJ's legal conclusions are sound and should be affirmed, but the mathematical calculation must be modified. Although the human resources manager for respondent indicates that claimant's name remained on the employment rolls, it is clear that claimant was not actively working for respondent. Claimant had gone on to work for another employer. Admittedly, claimant did not formally "quit" respondent's employ but it is undisputed that he earned no wages during that period. Even the business manager concedes that the list of employees represent people who are merely "available" and that these employees can work for short periods of time. And although that same business manager testified that jobs were available in the months following June 2008 and claimant was not assigned to any jobs during that period, there is no evidence whatsoever that he was *offered* employment, nor is there any evidence that claimant turned down any offers of employment from respondent during this period. To the contrary, he sought out employment elsewhere in order to earn wages.

Thus, based upon these facts, the Board finds the ALJ's decision to use just those weeks of employment beginning in October 2008 for purposes of calculating claimant's AWW is consistent with the intent of the statute and should be affirmed. The ALJ's method used the weeks that claimant actually worked following his de facto leave of absence. To

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[9] ALJ Award (Feb. 28, 2011) at 5.

do as respondent suggests would drastically reduce the reality of his wages, providing respondent with a windfall and would compel the finder of fact to ignore the statutory language referencing the "number of calendar weeks [claimant was] so employed."

The respondent's wage statement shows that claimant worked for two weeks and earned a total of $674.92. And when that figure is averaged over two weeks, the result is $347.46. The ALJ's Award is modified to reflect this figure as the AWW.

Although the parties have stipulated that claimant bears a 10 percent functional whole body impairment, respondent has asked for a credit for a 5 percent pre-existing impairment based upon Dr. Barrett's testimony.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the later injury is an aggravation of a preexisting condition. The Act reads, in part:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. **Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.**[10] (Emphasis added).

The Board interprets the above statute to require that a ratable functional impairment must preexist the work-related accident. The statute does not require that the functional impairment was actually rated or that the individual was given formal medical restrictions. But it is critical that the pre-existing condition actually constituted an impairment in that it somehow limited the individual's abilities or activities. An unknown, asymptomatic condition that is neither disabling nor ratable under the AMA *Guides*[11] cannot serve as a basis to reduce an award under the above statute.

A physician may appropriately assign a functional impairment rating for a pre-existing condition that had not been rated. However, the physician must use the claimant's contemporaneous medical records regarding the prior condition. The medical condition diagnosed in those records and the evidence of the claimant's subsequent activities and treatment must then be the basis of the impairment rating using the appropriate edition of the AMA *Guides*.

Here, the ALJ considered both permanent impairment opinions assigned by the physicians and concluded claimant sustained a 10 percent whole body impairment. Dr. Murati assigned a 15 percent whole body impairment while Dr. Barrett originally assigned

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[10] K.S.A. 2008 Supp. 44-501(c).

[11] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the 4th edition unless otherwise noted.

a 10 percent but later revised that, upon presentation of some older medical records, to be a 5 percent impairment. Dr. Murati did not speak to claimant's pre-existing impairment but conceded that had he had such records, his opinion might change. Under these facts and circumstances, the Board finds the ALJ's 10 percent finding should be affirmed. The 10 percent takes into account Dr. Barrett's pre-existing impairment assessment and merely averages that finding with those assigned by Dr. Murati.

The Board must consider whether claimant is entitled to permanent partial general benefits over and above those afforded by his functional impairment rating of 10 percent.

When, as here, an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

As noted above, a claimant is not entitled to a permanent partial general (work) disability when the post-injury employment yields a comparable wage, which is defined as 90 percent or more of the pre-injury AWW. The parties have agreed that claimant's post-injury wages exceeded those he earned pre-injury as of April 5, 2010. But in no event is an injured worker entitled to less than the value of the functional impairment.

Here, when the temporary total disability benefits (41.85 weeks) and the permanent partial functional impairment benefits (38.82 weeks) are considered and calculated, the payout of those benefits extends past April 5, 2010. Accordingly, claimant is not entitled

to a permanent partial general (work) disability at this time. If, however, he sustains a wage loss in excess of 10 percent, he would be entitled to request a Review and Modification.[12] Accordingly, the Board makes no finding with respect to claimant's wage loss or task loss at this time.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated February 28, 2011, is affirmed in part and modified in part as follows:

The claimant is entitled to 41.85 weeks of temporary total disability compensation at the rate of $231.65 per week or $9,694.55 followed by 38.82 weeks of permanent partial disability compensation at the rate of $231.65 per week or $8,992.65 for a 10 percent functional disability, making a total award of $18,687.20.

As of June 28, 2011 there would be due and owing to the claimant 41.85 weeks of temporary total disability compensation at the rate of $231.65 per week in the sum of $9,694.55 plus 38.82 weeks of permanent partial disability compensation at the rate of $231.65 per week in the sum of $8,992.65 for a total due and owing of $18,687.20, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of June 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: R. Todd King, Attorney for Claimant
William L. Townsley, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

[12] K.S.A. 44-528.